

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION**

FRANK FISCHER, an individual,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 2:05-cv-00763-DRB
)	
SYSCO FOOD SERVICES OF)	
CENTRAL ALABAMA, INC., et al.,)	
)	
Defendants.)	

SECOND MOTION TO DISMISS

COMES NOW the Defendant Sysco Food Services of Central Alabama, Inc. (hereinafter “Sysco”) and hereby moves this Court to dismiss this matter, pursuant to Federal Rules of Civil Procedure 37(b) and 41(b), based upon the Plaintiff’s failure to comply fully with the February 24, 2006 Order requiring the Plaintiff to respond to Sysco’s written discovery request and provide initial disclosures by March 10, 2006. As grounds therefore, Sysco states the following:

1. On February 23, 2006, Sysco filed a Motion to Compel.
2. On February 24, 2006, the Court ordered Plaintiff to respond to the Defendant’s written discovery and give initial disclosures by March 10, 2006.

3. On March 14, 2006, Sysco filed a Motion to Dismiss, based upon the Plaintiff's failure to comply with this Court's order compelling discovery.

4. On March 29, 2006, Plaintiff provided Sysco with his initial disclosures, but did not respond to Sysco's first interrogatories or request for production of documents.

5. On March 29, 2006, Plaintiff indicated in response to Sysco's motion to dismiss that failure to comply with discovery was inadvertent, because Plaintiff's counsel was not properly registered for the electronic filing system. Thus, counsel requested "an additional 14 days to respond to all discovery requests filed by the Defendant and pending."

6. On May 1, 2006, this honorable Court denied Sysco's motion to dismiss and denied Plaintiff's request for an additional 14 days to comply with discovery because of Plaintiff's, March 29, 2006, stated intent "to respond to all discovery requests."

7. As of the date of the filing of this motion, more than 50 days beyond the March 10 deadline, established by the Court, and more than 30 days since Plaintiff indicated he would respond within 14 days, Plaintiff has not complied with this Court's Order to completely respond to Sysco's discovery, having only submitted initial disclosures.

8. Sysco has suffered prejudice by Plaintiff's failure to participate in discovery. Sysco has yet to be able to depose the Plaintiff. Sysco needs to obtain written discovery responses first. Sysco is unable to adequately prepare its defense without both Plaintiff's discovery responses and taking Plaintiff's deposition.

9. This cases has been pending in this Court since August 17, 2005, yet almost nothing has happened toward preparing the case for trial or summary judgment. Sysco has been unable to move the case forward as a result of Plaintiff's failure to answer discovery.

10. Rule 41(b) of the Federal Rules of Civil Procedure provides for the dismissal of an action for failure to prosecute and failure to comply with an order of the Court.

11. Federal Rule of Civil Procedure 37(b)(2)(C) allows the Court to dismiss an action or proceeding or any part thereof and render a judgment by default against a disobedient party, as a sanction for failure to comply with an order regarding discovery.

12. This Court has give Plaintiff ample opportunity to come into compliance. Measures short of dismissal have failed. The Plaintiff's claims against Sysco are now due to be dismissed with prejudice for the failure to comply with the Court's Order and for failure to prosecute.

WHEREFORE, PREMISES CONSIDERED, Sysco respectfully requests the Court to dismiss the action with prejudice.

s/William D. Smith, Jr.
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CERTIFICATE OF SERVICE

I hereby certify that on May 4, 2006, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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and I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participants:

None.

s/William D. Smith, Jr.
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